

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
FIRST APPEAL NO.607 OF 1987

Vijaya Bank ...Appellant

vs.

Canara Bank and others ...Respondents

Mr.M.S.Bhandari i/b M/s.Madhukar Munim & Co. for the Appellant

CORAM: A.S.OKA,J.  
DATE : JANUARY 31,2007.

**ORAL JUDGMENT:**

1. The submissions of the learned Counsel for the Appellant were heard on 24th January 2007. On that day none appeared for the first Respondent. With a view to give one more opportunity to the first Respondent, the Appeal was ordered to be placed today. Today, when the Appeal is called out none appears for the first Respondent.

2. The Appellant is the original first Defendant. The Appellant has taken exception to the Judgment and Decree dated 29th March 1985 passed by the learned Judge of the City Civil Court, Mumbai in a suit filed by the first Respondent.

3. The case of the first Respondent in the suit is that a demand draft was issued on 11th October 1975 in the name of M/s.Shah Navalmal Narendrakumar in the sum of Rs.15,000/-. The said demand draft was purchased by the sixth

Respondent-sixth Defendant. The said draft was purchased by the sixth Respondent from the branch of the first Respondent at Secunderabad in the State of Andhra Pradesh. According to the case of the first Respondent, the sixth Respondent posted the said demand draft to the fifth Respondent at the address of the fifth Respondent in Bombay. On 21st November 1975, the Advocate for the sixth Respondent addressed a letter to the Manager of the Branch of the first Respondent at Secunderabad informing him that the said demand draft has been lost in the transit. On enquiry, it was found that the demand draft was encashed through the Appellant by the second to fourth Respondents (Defendant Nos.2 to 4 respectively). A criminal complaint has been filed by the sixth Respondent with the police and the police authorities arrested the second to fourth Respondents. According to the case of the first Respondent, second to fourth Respondents had stolen the demand draft and opened a bank account with Bandra Branch of the Appellant in the name and style of M/s.Shah Navalmal Narendrakumar. The said demand draft was presented to Bandra Branch of the Appellant for encashment. After the demand draft was encashed, the amount was withdrawn by the second to fourth Respondents. It is stated that the sixth Respondent obtained a duplicate demand draft in the sum of Rs.15,000/- and the same was encashed through the seventh Respondent (Defendant No.7). By a letter dated 6th November 1975, the first Respondent informed the Appellant about the loss of the

demand draft. By reply dated 13th November 1975, the Appellant informed the first Respondent that M/s. Shah Navalmal Narendrakumar opened an account with Bandra Branch of the Appellant on 24th October 1975 and deposited the said demand draft for crediting to the said account. A duplicate demand draft was issued by the first Respondent to the sixth Respondent on the basis of his application dated 27th October 1975. The prayer in the suit is for a money decree in the sum of Rs.15,000/- with interest against all the defendants. In the plaint, an averment has been made that the first Respondent was in doubt as to the Defendants from whom the amount should be obtained and therefore, they have joined all the Defendants in the suit in order that the question as to which of the Defendants are liable and to what extent may be determined between the parties as per Order I Rule 7 of the Code of Civil Procedure, 1908.

4. The Appellant filed a written statement and contested the suit filed by the first Respondent. The Appellant denied all the allegations made in the plaint and pointed out that there was no negligence on their part in opening the account in the name of Mr. Shah Navalmal Narendrakumar as the account was opened after the person concerned was duly introduced by an account holder. The learned Trial Judge accepted the case made out by the first Respondent that the Appellant did not act in good faith while collecting demand draft and by making

payment thereof to the second to fourth Respondents.

5. The learned Counsel for the Appellant submitted that the demand draft in question was in the name of an individual i.e. Mr. Shah Navalmal Narendrakumar and the account was also opened in the name of the said individual after the said person was duly introduced by one Prem Joaquim Aranha. He submitted that at the relevant point of time, the Appellant had no knowledge that the demand draft in question was stolen. He submitted that while opening the account, the Appellant has acted in good faith after taking all usual precautions. He invited my attention to the notes of evidence and the findings recorded by the Trial Court and submitted that the findings are contrary to the evidence on record. He submitted that there could not have been any decree as against the Appellant. None appears for the first Respondent.

6. I have considered the submissions made by the learned Counsel for the Appellant. It will be necessary to refer to the relevant averments made in the plaint. It must be noted here that in the plaint fifth Defendant is M/s. Shah Navalmal Narendrakumar. In paragraph 2 of the plaint, an averment has been made that an account was opened in the name of M/s. Shah Navalmal Narendrakumar with the Appellant on 20th October 1975. In paragraph 4 it is suggested that even the demand draft was issued in the name of M/s. Shah Navalmal

Narendrakumar. It will be necessary to reproduce the relevant part of paragraph 2 of the plaint which reads thus :

"2...The Plaintiffs are in doubt as to the person from whom they are entitled to obtain re-dressal or relief. The above defendants are joined as defendants in this suit in order that the question as to which of the defendants is liable to pay the amounts due to the Plaintiffs in this suit and to what extent, may be determined as between the parties according to Order 1 Rule 7 of the Civil Procedure Code, 1908. Therefore, in this suit the Plaintiffs pray that the decree may be passed only against that defendant or defendant who is liable to pay the amount due and payable to the Plaintiffs."

7. At this stage, it must be noted that the account opening form which has been duly exhibited shows that that account was opened in the name of Mr. Shah Navalmal Narendrakumar with the Bandra Branch of the Appellant and the account opening form is signed by the said person. It will be necessary to refer to the relevant part of the oral evidence on this aspect. The Appellant examined one Prem Joaquim Aranha as a witness. He is the landlord of the premises in possession of the Appellant wherein the Bandra branch of the Appellant is located. He was shown the said account opening form. He identified his

signature made on the said account opening form. He stated that one Shri Shah Navalmal Narendrakumar was having a problem for introduction for opening a bank account. He stated that the said gentleman approached him and therefore, he has put his signature on the account opening form. In the cross examination he stated that when the account holder requested him to sign the form, he signed it to oblige the said person. In the cross examination, he answered in affirmative the question "whether he introduced the person who was known to him?"

8. It will be also necessary to refer to evidence of the witness Shri M.K.Shetty who was examined on behalf of the Appellant. He was employed with the Appellant at the relevant time. He denied the case made out by the first Respondent that the bank was negligent in following the procedure when the account was opened on 20th October 1975. In the cross examination he stated that the Appellant-Bank was not having any account in the name of M/s.Shah Navalmal Narendrakumar. It must be noted here that perusal of the record shows that the demand draft dated 11th October 1975 is in the name of Mr. Shah Navalmal Narendrakumar and it is not in the name of any concern or firm. In the plaint, it is asserted that the demand draft was drawn in favour of M/s.Shah Navalmal Narendrakumar. Thus, it appears that an account was opened in the name of Mr.Shah Navalmal Narendrakumar after the said

person was duly introduced by the Witness No.2 examined by the Appellant. It is, thus, obvious that there cannot be any negligence or want of bonafides on the part of the Appellant while opening the account in the name of the said person.

9. At this stage, it will be necessary to refer to the evidence of the Officer examined by the first Respondent. The first Respondent examined one Shri Natwarlal Soni who was working as an Accountant in the first Respondent-Bank. He stated in the examination in chief that he knew the Defendant No.5 Mr.Shah Navalmal Narendrakumar and Defendant No.6 Devraj Gangaigh. He stated as to how the demand draft was purchased from Secundarabad Branch of the first Respondent. In the examination-in-chief, he has made out a case that the Appellant was negligent in allowing the original second to fourth defendants to open a bank account in the name of 5th defendant and while making the payment of amount of the draft to second to fourth Respondents. In the cross examination, he admitted that the demand draft was presented to the first Respondent for clearance on 21st October 1975 in its Account Section at Bombay. The said demand draft was okayed by the first Respondent after verifying the contents. He stated that the duplicate demand draft was issued by the issuing branch on 27th October 1975. In the cross examination, about opening the account he stated thus :

". I knew that the branch of Vijaya Bank Limited at 55, Waroda Road, Bandra was opened on 20/10/75. I know that defendants Nos.2, 3 and 5 were introduced to the Vijaya Bank branch at 55, Waroda Road, Bandra by the landlord of the premises of the said branch i.e. Topaz apartment...."

10. In paragraph 11 of the cross examination he stated thus :

"11. (Shown a xerox copy of a letter dated 21/10/75 addressed to the plaintiffs by defendant No.5). We received the original letter of this copy. (By consent copy taken and marked Exh.G) Exh.G was delivered to our bank on 21/10/75 at about 4.00 p.m. The original demand draft was cleared by our bank on 21/10/75 round about 12 noon. Defendant No.1 might have come to know about the clearance of the original draft on 21/10/75 round about 4, 4.30 p.m. The payments of demand draft was usually made by the bank to whom the draft is presented for payment by the customers on the next day. After we received Exh.G., we had orally informed Defendant No.1 that party concerned had intimated us the loss of original demand draft. We also told defendant No.1 to exercise caution while making payment of the demand draft to their customer. We had informed the main clearing office of Vijaya Bank about the loss of



original demand draft on 21/10/75..."

11. For the first time in the cross examination, he came out with a case that the first Respondent had orally informed the appellant that the party concerned had intimated to the first Respondent about the loss of original demand draft. This case is not made out either in the plaint or in the examination in chief of the said witness. No particulars are given such as the name of the Officer of the first Respondent who allegedly informed about the loss of the original draft to the Appellant. The name and designation of the Officer of the Appellant to whom this information was allegedly given is also not disclosed. It is pertinent to note that no such specific suggestion was given to Mr.M.K.Shetty who was examined on behalf of the Appellant. The learned Trial Judge has considered this aspect in the Judgment. In paragraph 17, the learned Judge held that he had no reason to doubt the statement made by the witness examined by the first Respondent that the oral intimation of loss of original demand draft was given to the Appellant. As pointed out earlier, no such case was ever made out either in the plaint or in the examination in chief of the said witness. It will be necessary to refer to the letter dated 22nd December 1975 sent by the first Respondent to its Recovery and Legal Section at Bangalore. The said letter is also silent about the alleged intimation given to the Appellant on 21st October 1975. The letter dated 6th

November 1975 was sent by the first Respondent to the Appellant informing the Appellant that the original demand draft was collected by the Appellant from the clearing section on 21st October 2007. Even in the said letter there is no such reference about any such intimation given to the first Respondent by the Appellant. It is, thus, clear that the case made out by the first Respondent regarding oral intimation given to the Appellant is clearly an afterthought and therefore, the learned Judge has committed an error in accepting the said case made out in the cross examination of the witness examined by the first Respondent. The learned Judge has committed a gross error by holding that the Appellant has not examined either the Manager or concerned Officer of the Bandra Branch to rebut the said case made out by the first Respondent. Thus, the evidence on record shows that there was no illegality in the action of the Appellant in opening the bank account in the name of Mr. Shah Navalmal Narendrakumar. There is nothing on record to show that the said demand draft was encashed and the amount was allowed to be withdrawn by the Appellant after the Appellant was informed that the draft was misplaced or lost in transit.

12. If this is the factual position, it is very difficult to hold that the Appellant is liable to repay the amount covered by the demand draft. Therefore, so far as the Appellant is concerned, the decree will have to be quashed and set aside.

Hence, I pass the following order :

- i) Impugned Judgment and Decree dated 29th March 1985 in L.C.Suit No.6343 of 1978 is modified.
- ii) It is directed that the said suit stands dismissed as against the Appellant. Rest of the decree is maintained as it is.
- iii) The Appeal is partly allowed in above terms. No order as to costs.

. At this stage, the learned Counsel for the Appellant pointed out that as a condition for grant of stay, the Appellant had deposited the decretal amount in the Trial Court. If the said amount is still pending with the trial Court, the Appellant will be entitled to withdraw the same. If the amount is already withdrawn by the first Respondent, appropriate steps will have to be taken by the Appellant.

**JUDGE**